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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA RESTAURANT ASSOCIATION, **Plaintiff,** **v.** **THE CITY AND COUNTY OF SAN FRANCISCO and THE SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH,** **Defendants.**	**Case No. CV-08-3247CW** **BRIEF OF PROFESSOR ROBERT POST OF YALE UNIVERSITY LAW SCHOOL, AND JENNIFER L. POMERANZ AND KELLY D. BROWNELL OF THE RUDD CENTER FOR FOOD POLICY AND OBESITY AT YALE UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY RELIEF AND PRELIMINARY INJUNCTION** **Date: September 4, 2008** **Time: 9 a.m.** **Judge: Claudia Wilken** **Location: Courtroom 2**

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Professor Robert Post of Yale University Law School, and Jennifer L. Pomeranz and Kelly D. Brownell of the Rudd Center for Food Policy and Obesity at Yale University ("Rudd Center") submit this brief in support of Defendants City and County of San Francisco and the San Francisco Department of Public Health ("San Francisco") and in opposition to the Motion for Declaratory Relief and a Preliminary Injunction filed by Plaintiff California Restaurant Association ("CRA").

STATEMENT OF INTEREST

Robert Post, J.D., Ph.D., is the David Boies Professor of Law at Yale University Law School. He is one of the nation's preeminent First Amendment scholars and has contributed and edited numerous books and authored over 80 law review articles, including: *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 Valparaiso Univ. Law Rev. 555 (2006); *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 Supreme Court Rev. 195; and *The Constitutional Status of Commercial Speech*, 48 UCLA Law Rev. 1 (2000). Amicus Post is a key advisor to the Rudd Center.

Jennifer L. Pomeranz, J.D., M.P.H., is the Director of Legal Initiatives at the Rudd Center and has worked extensively on implementing, defending, and supporting menu labeling legislation across the country.

Kelly D. Brownell, Ph.D., is the Director of the Rudd Center and is a professor in the Department of Psychology at Yale University, where he also serves as Professor of Epidemiology and Public Health. Amicus Brownell has published 14 books and more than 300 scientific articles and chapters.

The mission of the Rudd Center is to improve the world's diet, prevent obesity, and reduce weight stigma by connecting sound science with public policy. The Rudd Center strives to improve laws, practices, and policies related to nutrition and obesity. It seeks to inform and empower the public while encouraging global changes to allow individuals to maximize their own health. Based on the best scientific evidence available, the Rudd Center supports menu labeling legislations in cities and states across the country as an effective method of addressing

the current epidemic of obesity. San Francisco's adoption of Ordinance 40-08 amending San Francisco Health Code Sections 468 through 468.8 (March 24, 2008), Menu Labeling at Chain Restaurants ("Ordinance 40-08"), directly furthers the Rudd Center's mission.

Amici Post, Pomeranz and Brownell (collectively, "Amici") submit this brief in support of San Francisco and against Plaintiff's motion. Amici address the First Amendment issues presented by the case.

BACKGROUND

In San Francisco, 43% of the adults and 24% of school-age children are overweight or obese. See San Francisco Health Code ("Health Code") § 468.1. The leading causes of death and disability in San Francisco are due to diseases highly correlated with obesity: heart disease, diabetes, hypertension, and cancer. *Id*. The San Francisco Department of Public Health estimates that the obesity epidemic costs San Francisco $192 million a year in medical expenses, lost productivity and workers' compensation. *Id*. The estimated cost to the Department for diabetes alone was $25 million in the year 2005. *Id*.

In an effort to address these public health issues, San Francisco adopted Ordinance 40-08 in order to provide consumers with information about the nutritional components of the food "prepared, purchased and eaten outside the home" to enable them to "make healthier choices." Health Code §§ 468, 468.1. Through this regulation, San Francisco requires that chain restaurants disclose the total number of calories of menu items on menu boards and food tags (*id.* § 468.3(c) and (d)), and the total number of calories, saturated fat, carbohydrates and sodium on menu boards. *Id.* § 468.3(b).

Ordinance 40-08 advances San Francisco's interest in reducing obesity by preventing consumer confusion and promoting informed consumer decision-making. Sound scientific evidence strongly supports this rationale. Studies have found that 9 out of 10 people underestimate the calorie content of less-healthy items by an average of more than 600 calories

(almost 50% less than the actual calorie content).[1] One survey performed at the American Dietetic Association's annual meeting shows that even professional nutritionists underestimate the calorie content of restaurant foods by 220 to 680 calories.[2] Studies show that consumers routinely consult food labels when available,[3] and that as a result they change their food purchasing habits.[4] In one study, consumers presented with calorie content on the menu chose high-calorie items one-third less frequently.[5] Without this nutritional information, consumers have no way of choosing items that fit their nutritional needs. Polling data confirms that consumers overwhelmingly want this information. *See* Health Code § 468.1.

The consensus that consumers are unable to estimate the nutritional composition of prepared foods and beverages, and that they would use the information about this composition to make choices better suited for their nutritional needs, prompted New York City to enact a menu label law earlier this year that is very similar to Ordinance 40-08. Under New York City's ordinance, covered food service establishments are required to disclose the calorie content of their menu items on menu boards and food tags. *See* New York City Health Code § 81.50 (Jan. 22, 2008). The New York State Restaurant Association ("NYSRA") challenged the New York City ordinance arguing the same federal deficiencies as CRA argues here. Judge Howell of the Southern District of New York found in favor of New York City on all counts. *See New York State Rest. Ass'n v. New York City Board of Health, et al.*, Case No: 1:08-cv-1000 (RJH), Mem. Op. & Order of the U.S. District Court for the Southern District of New York (April 16, 2008)

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[1] S. Burton, E.H. Creyer, J. Kees & K. Huggins, *Attacking the obesity epidemic: the potential health benefits of providing nutrition information in restaurants*, 96 Am. J. Public Health 1669-75 (2006).

[2] J. Backstrand, M.G. Wootan, L.R. Young & J. Hurley, *Fat Chance*, Washington, DC: Center for Science in the Public Interest (1997).

[3] Centers for Disease Control and Prevention, National Center for Health Statistics, U.S. Dept. of Health and Human Servs., *Healthy People 2000 Final Review* (2001).

[4] A.S. Levy & B.M. Derby, Center for Food Safety and Applied Nutrition, Food and Drug Administration, *The Impact of NLEA on Consumers: Recent Findings from FDA's Food Label and Nutrition Tracking System* (1996).

[5] Burton, *supra* note 1.

("SDNY Opinion and Order"). Specifically, the court found that the federal Nutrition and Labeling and Education Act of 1990 ("NLEA") does not preempt locales' ability to enact menu labeling laws, and "that the required disclosure of calorie information is reasonably related to the government's interest in providing consumers with accurate nutritional information and therefore does not unduly infringe on the First Amendment rights of NYSRA members." *Id*. at 2-3. NYSRA appealed this decision to the Second Circuit and simultaneously sought a stay of enforcement. The District Court rejected the stay and the Second Circuit later denied NYSRA's application to extend the period during which no fine will be imposed on covered establishments that violate the ordinance. A decision on the appeal is pending.

San Francisco's disclosure requirement implements sound public policy reflecting information the public health community has known for years. The regulation requires that nutritional information be disclosed in the most effective possible way – at the point of purchase. Similar disclosure requirements are common in federal and state regulatory programs designed to promote consumer information and prevent potential consumer confusion. Plaintiff argues that Ordinance 40-08 compels speech in violation of the First Amendment of the United States Constitution and Article I of the California Constitution. *See* Mem. of Law in Support of Pl.'s Mot. for Declaratory Relief & a Prelim. Injunction ("CRA Br.") at 22-34. If Plaintiff's argument is accepted, innumerable federal and state regulations requiring commercial actors to disclose uncontroversial factual information will be rendered constitutionally suspect. The regulatory structure of consumer protection in California and the United States, which relies heavily on promoting information transparency to encourage informed consumer decision-making, will be jeopardized. The government's ability to address the obesity epidemic through regulations promoting informed consumer choice and personal responsibility would be derailed.

ARGUMENT

I. Ordinance 40-08 Requires the Disclosure of Factual and Uncontroversial Commercial Information

Ordinance 40-08 requires that "chain restaurants" post the total number of calories, saturated fat, carbohydrates, and sodium of each product "next to or beneath each Menu Item" on

the menu. Health Code § 468.3(a), (b). The ordinance also requires that federally recommended daily limits of calories, saturated fat and sodium also be clearly posted on the menu. *Id*. The ordinance mandates that chain restaurants using a menu board post the total number of calories "next to or beneath each Menu Item on the Menu Board" (*id.* § 468.3(c)), and that restaurants using food tags post the total number of calories "on the Food Tag." *Id.* § 468.3(d). The ordinance expressly allows food service establishments to provide additional nutritional information. *See id.* § 468.3(a). Restaurants are also free to post disclaimers indicating "that there may be minimal variations in nutritional content values across servings based on slight variations in serving size and quantities of ingredients, and based on special ordering." *Id.* § 468.3(f).

Ordinance 40-08 does not require restaurants to state an opinion or belief. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977). It does not require them to subsidize advertisements. *Cf. United States Dept. of Agriculture v. United Foods*, 533 U.S. 405 (2001). It does not require them to disclose controversial facts. *Cf. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). It does not force any CRA member to take a position in any ongoing debate. *Cf. Pacific Gas & Electric Co. v. Public Utilities Comm. of Cal.*, 475 U.S. 1, 14 (1986). The ordinance does not prevent restaurants from announcing that they are disclosing calorie content under legal compulsion or from disclosing any additional data they deem necessary. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); *see also Meese v. Keene*, 481 U.S. 465, 481 (1987); *Environmental Defense Center v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003). Ordinance 40-08 does not preclude food service establishments from expressing whatever additional information or opinions they wish. Plaintiff is simply incorrect that Ordinance 40-08 compels restaurants to voice a "message" or "government viewpoints." CRA Br. at 23-24.

The San Francisco ordinance compels the disclosure only of "purely factual and uncontroversial" commercial information – the nutritional contents of restaurant menu items. *Zauderer*, 471 U.S. at 651. It requires the disclosure of the total number of calories. Health Code § 468.3(a)(1). A calorie is the "[a]mount of heat needed to raise the temperature of 1 gram

of water by 1 degree Celsius." Peter S. Murano, Understanding Food Science and Technology G-3 (Wadsworth/Thomson Learning 2003). It requires the disclosure of the total amount of saturated fat. Health Code § 468.3(a)(2). Saturated fat is a "[f]atty acid chain that does not contain any carbon-to-carbon double bonds." Murano, *supra* at G-16. It requires the disclosure of the total amount of carbohydrates. Health Code § 468.3(a)(3). Carbohydrates "are composed of the elements carbon (C), hydrogen (H), and oxygen (O)" and can be classified as monosaccharides, disaccharides, or polysaccharides. Murano, *supra* at 66-67. And the ordinance requires the disclosure of the total amount of sodium. Health Code § 468.3(a)(4). Sodium is a mineral, which is an inorganic substance listed on the periodic table of elements. Murano, *supra* at 75, 77. This is the same factual information that the NLEA requires food producers to disclose. *See* 21 U.S.C. § 343. If CRA is correct that compelled disclosures required by Ordinance 40-08 violate the First Amendment, so also does the NLEA. Yet in this Court CRA takes the position that the NLEA is constitutional and that it preempts Ordinance 40-08. *See* CRA Br. at 9-21.

Ordinance 40-08 is a commercial disclosure regulation indistinguishable from thousands of analogous regulations routinely applied to transactions in the commercial marketplace to provide consumers with information. Courts uniformly have held that the compelled disclosure of uncontroversial factual information in the context of the sale and purchase of goods is compelled commercial speech. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483 (1995); *Environmental Defense Center v. EPA*, 344 F.3d 832, 851, n.27 (9th Cir. 2003); *National Electrical Manufacturers Ass'n v. Sorrell* ("*Sorrell*"), 272 F.3d 104, 113 (2d Cir. 2001); *Environmental Law Foundation v. Laidlaw Transit Servs.*, Case No. 451832, 2008 WL 2157672 (Cal. Super. Jan. 8, 2008). "Innumerable federal and state regulatory programs require the disclosure of product and other commercial information." *Sorrell*, 272 F.3d at 116.

Federal law, for example, requires that textile and wool products be labeled with their fiber content, country of origin, and the identity of the business responsible for marketing or handling the item. *See* Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*; Wool Products Labeling Act of 1939, 15 U.S.C. § 68, *et seq.* It requires that articles of apparel made

of fur be labeled, and that invoices and advertising for furs and fur products specify the true English name of the animal from which the fur was taken, and whether the fur is dyed or previously used. *See* Fur Products Labeling Act, 15 U.S.C. §§ 69-69j. It requires that for personal property leases that exceed 4 months and that are made to consumers for personal use, a written disclosure of lease costs, taxes, fees and terms be disclosed; and it also requires certain disclosures be made in the lease advertising. *See* Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended. It requires that cosmetic products display an information panel which lists ingredients. *See* 21 C.F.R. § 701.3. It requires that packaged food and beverages disclose their ingredients (21 U.S.C. § 343(i)), the net weight of their contents (21 U.S.C. § 343(e)), and their percentage of alcohol by volume (27 U.S.C. § 205(e)(2)). Foods regulated by the Food and Drug Administration ("FDA") must be labeled with all ingredients that are derived from the eight most common food allergens (milk, eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat, soybeans). *See* Food Allergen Labeling and Consumer Protection Act of 2004, Title II of Public Law108-282 (Aug. 2, 2004).

California law requires lenders who give variable interest loans to provide consumers with a statement "consisting of the following language: NOTICE TO BORROWER: THIS DOCUMENT CONTAINS PROVISIONS FOR A VARIABLE INTEREST RATE." Cal. Civ. Code § 1916.5(a)(6). It requires that cooperative corporations formed under California Corporations Code include the following statement in their articles of incorporation: "This corporation is a cooperative corporation organized under the Consumer Cooperative Corporation Law. The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under such law." Cal. Corp. Code § 12310(b). It requires that products with removable or rechargeable batteries be conspicuously labeled with the following statements: "NICKEL-CADMIUM BATTERY. MUST BE RECYCLED OR DISPOSED OF PROPERLY." or "SEALED LEAD BATTERY. MUST BE RECYCLED OR DISPOSED OF PROPERLY." Cal. Pub. Res. Code § 15013(b). It requires that "[e]ach container of bottled water sold in this state, each water-vending machine, and each container provided by retail water facilities located in this state shall be clearly labeled" to include the source of the bottled water, a

description of the treatment process or, if none, a statement to that effect, and the name and contact information for the bottler, brand owner, or facility operator. Cal. Health & Safety Code § 111170.

Contrary to CRA's assertions (CRA Br. at 32), the government may require the disclosure of noncontroversial, factual information in the context of commercial speech for many reasons other than protecting consumers from deception or warning consumers about "inherently dangerous" products. Such disclosures are routinely required to protect public health and to serve the general welfare. Consumer protection law is based on the belief that the disclosure of factual and uncontroversial information will promote knowledgeable consumer decision-making. *See, e.g.*, 15 U.S.C. § 1451 (Congressional declaration of the policy for the Fair Packaging and Labeling Act: "Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons.").

Compelled disclosures also frequently reduce information costs and thereby increase market efficiency. *See* Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics. Why Markets Fail: Incomplete Information* 612 (Prentice Hall 1998). They reduce potential consumer confusion. *See, e.g., In re Matter of Policies and Rules Concerning Interstate 900 Telecommunications Services*, 6 FCC Rcd. 6166, 6168 (Sept. 26, 1991) ("The preamble [requirement] is designed to prevent deception and confusion by providing the consumer 'purely factual and uncontroversial information about the terms under which [the] services will be available,' thereby enabling the consumer to make an informed purchasing decision."). They enable consumers to make decisions that will best serve their own best interests, including their own interests in health and safety. *See* 137 Cong. Rec. E 1165 (April 9, 1991) (Rep. John Moakley: NLEA authorizes the FDA to regulate food labels "to help consumers choose healthful foods in the context of a total daily diet without the confusing and all-too-often misleading information currently on many food labels.").

If CRA's constitutional arguments were accepted, none of these regulations would be constitutionally permissible.

II. The First Amendment Standard for Commercial Disclosure Requirements of Factual and Uncontroversial Commercial Information is the Reasonable Relationship Test, Not Intermediate Scrutiny Under *Central Hudson*

Courts uniformly have held that the compelled disclosure of factual and uncontroversial commercial information is constitutional under the First Amendment if it is reasonably related to an appropriate state interest. Although the general standard for restrictions on commercial speech is the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), regulations that compel "purely factual and uncontroversial" commercial speech are "acceptable less restrictive alternatives to actual suppression of speech" and thus subject to more lenient review. *Zauderer*, 471 U.S. at 651, n.14.

The asymmetry between the constitutional test applied to restrictions on commercial speech and the constitutional test applied to compelled disclosure of factual and uncontroversial commercial information follows directly from the justification announced by the Supreme Court for First Amendment protection of commercial speech. The Court explained:

> Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

The Court explained that commercial speech merits constitutional protection because it conveys information necessary for "public decisionmaking," and it has repeatedly reaffirmed this conclusion: "The First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson*, 447 U.S. at 563. "A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"

First National Bank v. Bellotti, 435 U.S. 765, 783 (1978) (quoting *Virginia State Board of Pharmacy*, 425 U.S. at 764).

Restrictions on commercial speech *interrupt* the flow of commercial information to the public and thus interfere with the constitutional value of commercial speech. They are therefore subject to the intermediate scrutiny of the *Central Hudson* test. By contrast, legislation that requires commercial vendors to disclose factual and uncontroversial information increases the flow of commercial information to consumers and thus serves the same constitutional purpose as does the constitutional protection extended to commercial speech. Moreover, CRA does not argue, nor could it argue, that Ordinance 40-08 restricts the ability of its members to speak. Because 40-08 does not suppress expression, it is not encompassed within the rationale of *Central Hudson* and its progeny.

The Supreme Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, explicitly held that compelled disclosure of factual and uncontroversial commercial information is constitutional if it bears a reasonable relationship to an appropriate state interest. 471 U.S. at 651. In *Zauderer*, the Court considered a state requirement that attorney advertisements for contingent-fee representation must disclose "whether percentages are computed before or after deduction of court costs and expenses." *Id.* at 633. The Ohio Office of Disciplinary Counsel filed a complaint against an attorney named Philip Q. Zauderer for not complying with this disclosure requirement.

Zauderer argued that the Ohio disclosure requirement violated his First Amendment right not to speak. The Court disagreed:

> The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that plaintiff include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.

Id. at 651. The Court explained that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," and that therefore "plaintiff's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S.

at 651 (emphasis in the original) (citing *Virginia State Pharmacy Board*, 425 U.S. 748). Noting the "material differences between disclosure requirements and outright prohibitions on speech" (471 U.S. at 650), *Zauderer* unambiguously held that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 651 n.14.

Zauderer thus stands for the general rule that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to" a governmental interest. *Id.* at 651. In *Zauderer*, Ohio sought to require disclosure of factual and noncontroversial commercial information about contingency fee agreements in order to prevent potential consumer deception. But nothing in the Court's reasoning limited the application of the "reasonable relationship" test to the particular state interest of preventing consumer deception. Instead, the Court's analysis rested on the understanding that the constitutional values served by the commercial speech doctrine dictate that the constitutional review of "disclosure requirements" be different than that of "outright prohibitions on speech." *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 26-28 (2000).

This is the interpretation of *Zauderer* adopted by all Circuit Courts that have considered the question. Plaintiff incorrectly asserts that the Second Circuit "dramatically extended *Zauderer*" in *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), and thus that the Southern District of New York should not have applied the reasonable basis test in *NYSRA v. New York City*. CRA Br. at 29-30. But *Sorrell* properly understood and applied the essential logic of *Zauderer*.

In *Sorrell*, the Second Circuit considered a First Amendment challenge by the National Electrical Manufacturers Association to a Vermont statute requiring "manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste." 272 F.3d at 107. The Second Circuit held that the compelled disclosure of factual and uncontroversial commercial information is constitutional if there is "a rational connection between the purpose of" the disclosure requirement and "the means employed to realize that

purpose." *Id*. at 115. The court reasoned that "*Zauderer*, not *Central Hudson Gas & Electric Corp*. . . . describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases." *Id*. (internal citations omitted).

The Second Circuit explained that the reasonable relationship test was the appropriate standard of review for compelled disclosure of factual and uncontroversial commercial information because such disclosure:

> does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.

Id. at 114.

In applying the "reasonable-relationship rule" of *Zauderer* to determine whether the Vermont statute was constitutional, the Second Circuit identified the state interest served by the statute as "protecting human health and the environment from mercury poisoning." *Id.* at 115. Vermont expected that by "increasing consumer awareness of the presence of mercury in a variety of products," it could "reduce the amount of mercury released into the environment." *Id.* This goal has nothing to do with preventing consumer deception, and instead is based on the expectation that better informing "consumers about the products they purchase" will lead to more intelligent decision-making that will serve to protect human health. *Id.*[6]

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[6] California's Proposition 65 has a similar requirement which requires disclosure of the presence of toxic chemicals including mercury. *See* Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Saf. Code §§ 25249.5-25249.13. Through this provision, dentists are required to disclose information about mercury content and toxicity for dental materials. Cal. Bus. & Prof. Code §§ 1648.10-1648.20. One of the declared purposes of Proposition 65 is for the people of California "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm." Cal. Health & Saf. Code, Div. 20, Ch. 6.6 Note § 1(b) (approved Nov. 4, 1986). Like the requirement in *Sorrell*, California's Proposition 65 was enacted to further the health and safety of the population through increased information.

The Ninth Circuit specifically relied on *Sorrell* to conclude that government can compel the disclosure of noncontroversial, factual, commercial information. In *Environmental Defense Center v. EPA*, the Ninth Circuit responded to challenges to certain regulations promulgated by the Environmental Protection Agency ("EPA") under sections of the Clean Water Act dealing with pollution from stormwater runoff. 344 F.3d 832 (9th Cir. 2003). One such regulation compelled municipalities ("MS4s") to "distribute educational materials to the community" about the impact of stormwater discharges and to "inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." *Id*. at 848. The purpose of the disclosure requirement was to inform the public how to dispose of toxins, not to prevent consumer deception. The regulation was enacted with the expectation that better informed consumers will lead to better informed decision-making to protect public health. The Ninth Circuit specifically invoked *Sorrell* to liken the disclosure requirement at issue to other similar labeling requirements:

> In deciding [a] similar question, . . . the Second Circuit held that "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001). . . . We think the policy considerations underlying the commercial speech treatment of labeling requirements, *see, e.g.*, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333-39, apply similarly in [this] context.

344 F.3d 832, 851 n.27 (9th Cir. 2003). The Ninth Circuit thus held that the requirement ought not to be subject to elevated First Amendment scrutiny:

> As in *Zauderer v. Office of Disciplinary Counsel of the Sup*. Ct. of Ohio, 471 U.S. 626 (1985), where the Supreme Court upheld certain disclosure requirements in attorney advertising, "[t]he interests at stake in this case are not of the same order as those discussed in *Wooley* . . . and *Barnette* . . . ." *Id.* at 651. EPA has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).
>
> Informing the public about safe toxin disposal is non-ideological; it involves no "compelled recitation of a message" and no "affirmation of belief." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). . . . It does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the Phase II Rule itself. Nor is the MS4 prevented from identifying its dissemination of public

> information as required by federal law, or from making available federally produced informational materials on the subject and identifying them as such.

Id. at 849-50.

The First Circuit has likewise agreed with this interpretation of *Zauderer*. In *Pharmaceutical Care Management Association v. Rowe*, 429 F.3d 294 (1st Cir. 2005), the First Circuit considered a challenge to a Maine statute requiring that pharmacy benefit managers ("PBMs"), who act as intermediaries between pharmaceutical manufacturers and health benefit providers, disclose to providers conflicts of interest and certain financial arrangements with third parties. 429 F.3d at 299 (Op. of Torruella, J.). The purpose of these disclosure requirements was to place "Maine health benefit providers in a better position to determine whether PBMs are acting against their interests, and correspondingly, to help control prescription drug costs and increase access to prescription drugs." *Id.* at 298-99. The First Circuit applied *Zauderer* to dismiss a First Amendment challenge to the statute:

> [The] First Amendment claim is completely without merit. So-called "compelled speech" may under modern Supreme Court jurisprudence raise a serious First Amendment concern where it effects a forced association between the speaker and a particular viewpoint. . . .
>
> What is at stake here, by contrast, is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes-in this case, protecting covered entities from questionable PBM business practices. There are literally thousands of similar regulations on the books-such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer.
>
> The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), makes clear "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id*. at 651. This is a test akin to the general rational basis test governing all government regulations under the Due Process Clause. The test is so obviously met in this case as to make elaboration pointless.

Id. at 316 (Op. of Boudin, C.J.); *see also id*. at 297-98 (*per curiam* holding that the joint concurring opinion of Chief Justice Boudin and Judge Dyk represents the opinion of the court with respect to the First Amendment issues).

III. Ordinance 40-08 Meets the Reasonable Relationship Test

San Francisco's ordinance meets the reasonable relationship test of *Zauderer*. San Francisco enacted Ordinance 40-08 (1) to reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated therewith. The ordinance is reasonably related to these governmental interests.

A. Ordinance 40-08 Reduces Consumer Confusion

San Francisco relied on studies and polls to conclude that "[w]ithout nutrition information, consumers consistently underestimate the nutritional content of restaurant foods." Health Code § 468.1. It also found that, "the fact that chain restaurants' serving sizes are so varied and large, and their prices are so low, can mislead and even deceive the public regarding the amount of an actual serving size and how many calories a portion contains." *Id*. In enacting Ordinance 40-08, San Francisco sought to correct the information disparity that currently harms consumers.

CRA concedes that the reasonable relationship test of *Zauderer* applies to regulations that compel disclosure of factual and uncontroversial commercial information in order to prevent potential consumer deception. CRA Br. at 29-30. Ordinance 40-08 was enacted in part in order to serve this purpose. Thus, on this basis alone, Ordinance 40-08 should easily be upheld against CRA's First Amendment challenge.

In enacting Ordinance 40-08, San Francisco relied on independent studies and found that when "nutritional information is provided, consumers use it to make healthier choices." Health Code § 468.1.

This premise that providing consumers with factual and uncontroversial commercial information will inform consumer decision-making and reduce the likelihood of consumer deception, is the same premise that underlies federal legislation like the NLEA. Congress specifically recognized the elimination of consumer confusion as one of the purposes behind enacting the NLEA:

> The purpose of those amendments, known collectively as the NLEA, was: (1) To make available nutrition information that can assist consumers in selecting foods that can lead to healthier diets, (2) *to eliminate consumer confusion* by establishing definitions for nutrient content claims that are consistent with the terms defined by the Secretary [of

> Health and Human Services], and (3) to encourage product innovation through the development and marketing of nutritionally improved foods.

H.R. Rep. No. 538, 101st Cong., 2d Sess. 8-10, *reprinted* in 1990 U.S.C.C.A.N. 3336, 3337-38 (emphasis added). If this purpose suffices to establish the constitutionality of the compelled disclosure required by the NLEA, it equally suffices to establish the constitutionality of the disclosure required by Ordinance 40-08.

Empirical studies suggest that almost half of Americans report that nutrition information provided on food labels has caused them to change their mind about purchasing particular products. Health Code § 468.1. Because there is no reason to suppose that the nutrition information which Ordinance 40-08 requires to be disclosed will be any less effective in reducing the likelihood of consumer confusion and deception than the same information which the NLEA requires to be disclosed, it follows that Ordinance 40-08 is reasonably related to a proper state interest and that it therefore passes the test of *Zauderer*. This is true regardless of whether Ordinance 40-08 also serves the additional state interest of combating the current epidemic of obesity.

B. Ordinance 40-08 Improves Public Health by Reducing Obesity through Promoting Informed Consumer Decision-Making

Ordinance 40-08 seeks to promote public health by providing consumers with more complete information about the nutritional content of the food that they eat. San Francisco specifically found that:

> Consumers must have basic nutritional information readily available in order to make informed choices about the Food that they, and their children and dependants, eat. These sections require Chain Restaurants to provide consumers with specific nutritional information . . . so that consumers may be better able to make nutritional choices consistent with their health needs. Furthermore, ensuring informed food choices supports societal public health goals of preventing obesity, diabetes, and other avoidable nutrition-related diseases.

Health Code § 468. Based on scientific studies, San Francisco concluded that the "increase in per capita restaurants accounts for 65% of the increase in the percentage of those who are obese." Health Code § 468.1. This is because restaurant foods are often served in large portions

and generally contain an excess of calories, saturated fat, trans-fat and sodium. *Id*. San Francisco concluded, and studies confirm, that there is "a positive association between eating out and higher caloric intakes and higher body weights." *Id*.

San Francisco's findings are supported by independent scientific research demonstrating that consumers routinely consult food labels and make positive changes to their food purchasing habits. Health Code § 468.1. In one study, consumers presented with calorie information on a restaurant menu chose high-calorie items one-third less frequently. *Id.* Economists from the National Bureau of Economic Research have estimated that the information required by the NLEA to be set forth in food labels has produced a decrease in body weight that over a 20-year period has generated a total monetary benefit of about $63-166 billion (in 1991 dollars). *See* J.N. Variyam & J. Cawley, *Nutrition Labels and Obesity*, National Bureau of Economic Research, working paper 11956 (Jan. 2006). This benefit flowed from the fact that two-thirds of adults at least sometimes read nutrition information about calories, fat, or cholesterol listed on a label when they buy a food item for the first time.

This record suffices to establish the rationality of Ordinance 40-08 under the reasonableness test of *Zauderer*. In its brief, Plaintiff states that Ordinance 40-08 may not in fact succeed in reducing obesity. CRA Br. at 4-5. This argument may have been significant in the constitutional universe of *Lochner v. New York*, 198 U.S. 45 (1905), but in the 21st century, it is well established that courts cannot strike down government regulations merely because the regulations may not achieve their goals, and that to do so would ultimately result in no government legislation at all. Under modern constitutional standards like those contained in *Zauderer*, 471 U.S. at 652-53, and even in *Central Hudson*, 447 U.S. at 570, it is sufficient for the state to advance regulations supported by rational and relevant evidence. *See also Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). Ordinance 40-08 easily passes this test. [7]

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[7] It is noteworthy that the "evidence" on which Plaintiff relies to support its argument that Health Code 40-08 does not advance San Francisco's interest in preventing obesity is the Declaration of David B. Allison, which was submitted in the *NYSRA v. NYC* matter. *See* CRA (continued…)

Ordinance 40-08 is consistent with the recommendation of leading public health authorities. There is virtual unanimity that requiring the effective communication of factual nutritional information for food consumed away from home is necessary if consumers are to make informed decisions. *See* Health Code § 468.1. Ordinance 40-08 provides this information to consumers in a manner that public health professionals regard as most effective in promoting informed consumer decision-making – at the point of purchase.[8] Requiring nutritional disclosure at the point of purchase ensures that consumers can utilize this information prior to purchase and during decision-making. San Francisco found that current methods used by restaurants to communicate nutrition information to customers are inadequate. See Health Code § 468.1. This conclusion is supported by independent studies.[9]

Ordinance 40-08 is reasonably related to the San Francisco's interest in reducing obesity by promoting informed consumer decision-making. It is accordingly constitutional under the test of *Zauderer* regardless of whether it also serves the additional interest of reducing potential consumer confusion.

Br. at 25-26. As reported in the New York Times, Dr. Allison resigned from his position as incoming president of the Obesity Society in response to "criticism from some of the group's members after he wrote an affidavit as a paid consultant on behalf of the restaurant industry." S. Saul, *Conflict on the Menu*, N.Y. Times, Feb. 16, 2008, Sec. C-1. As the New York Times reported it: "Because Dr. Allison's position ran counter to the conventional thinking in his field, some critics contended that it illustrated the way industry money can influence scientific and medical debate." *Id.*

[8] *See* The Institute of Medicine, *Preventing childhood obesity health in the balance*, National Academies Press, Washington, DC (2005) at 165-66 (Recommending that "[f]ull-service and fast food restaurants should expand healthier food options and provide calorie content and general nutrition information at point of purchase."); AMA House of Delegates, *Nutrition Labeling and Nutritionally Improved Menu Offerings in Fast-Food and Other Chain Restaurants*, Resolution: 419 (A-07) at 2 ("Our American Medical Association support federal, state, and local policies to require fast-food and other chain restaurants . . . to provide consumers with nutrition information on menus and menu boards.").

[9] *See, e.g.*, M.G. Wootan & M. Osbord, *Availability of nutrition information from chain restaurants in the United States*, 30(2) Am. J. of Preventative Med. 266-68 (2006); M.G. Wootan, M. Osborn & C.J. Malloy, *Availability of point-of-purchase nutrition information at a fast-food restaurant*, 43 Am. J. of Preventative Med. 458-59 (2006).

IV. The Holding of *United Foods* is Inapplicable to Ordinance 40-08

Plaintiff characterizes Ordinance 40-08 as forcing "a private party to convey the government's message as if it were the private party's message when the private party wishes to convey a different message or no message at all." CRA Br. at 28. It similarly argues that enforcement of Ordinance 40-08 will lead "consumers to mistakenly assume that the posting of calories conveys the restaurants' own point of view," in violation of *United States Department of Agriculture v. United Foods*, 533 U.S. 405 (2001). *Id*. This is simply an untenable characterization of the ordinance.

Mandated disclosures of factual and uncontroversial commercial information are routine and they are always understood as requiring simply the publication of relevant factual information. If Plaintiff were correct that requiring disclosure of factual information somehow meant that restaurants were required to espouse a particular "point of view" with which the restaurants disagreed, than all compelled factual disclosure such as that mandated by the NLEA would be constitutionally suspect. Indeed, if Plaintiff's argument were accepted, every such statute would be transformed into compelled ideological speech that is constitutionally suspect. But no court has interpreted the mandated disclosure of factual and noncontroversial commercial information about a commercial actor's own products and services as requiring it to espouse a particular point of view.

Plaintiff's flawed position rests on a misunderstanding of *United States Department of Agriculture v. United Foods*, 533 U.S. 405 (2001). *See* SDNY Opinion and Order at 17 ("NYSRA's reliance on United Foods is misplaced."). *United Foods* involved a federal statute authorizing a Mushroom Council to impose mandatory assessments upon handlers of mushrooms for generic advertising. 533 U.S. at 408. One mushroom handler contended that the "forced subsidy for generic advertising" violated its First Amendment right not to be "charged for a message . . . that mushrooms are worth consuming whether or not they are branded," because it wanted to "convey the message that its brand of mushrooms [were] superior to those grown by other producers." *Id.* at 411. The Court held that the First Amendment was implicated because the federal statute required "producers to subsidize speech with which they disagree." *Id*. at 411.

Ordinance 40-08, in contrast to the federal statute in *United Foods*, does not require commercial speakers to subsidize speech with which they disagree. Ordinance 40-08 requires only the disclosure of factual and uncontroversial commercial information about the nutrition content of their foods and beverages. There is nothing subjective or ideological about this information. Ordinance 40-08 does not require restaurants to disclose a point of view about the meaning or significance of the nutritional information; to the contrary, it permits restaurants to say about this requirement whatever they wish to communicate.

Plaintiff does not here contend that the disclosures required by Ordinance 40-08 are inaccurate; thus, there is no basis for suggesting that Plaintiff somehow "disagrees" with the content of the information that must be displayed pursuant to Ordinance 40-08. At most, Plaintiff objects to the requirement that this factual information be disclosed. But this same objection can be made to all legislation that requires disclosure of factual and noncontroversial commercial information. This objection has nothing to do with the constitutional concern of *United Foods*, which extended First Amendment protection to commercial speakers who were compelled to subsidize messages that contained content with which they could in fact disagree. *See* 533 U.S. at 411.

V. The Reasonable Relationship Test Also Applies Under Article I of the California Constitution

The California Supreme Court has stated that the "free speech clause" of the California Constitution "is at least as broad as the First Amendment's, and its right to freedom of speech is at least as great." *Gerawan Farming, Inc. v. Lyons* ("*Gerawan I*"), 24 Cal. 4th 468, 490 (2000). The California Supreme Court has held that decisions of the U.S. Supreme Court "are entitled to respectful consideration and ought to be followed unless persuasive reasons are presented for taking a different course." *People v. Teresinski*, 30 Cal. 3d 822, 836 (1982). California courts do just that. Thus, for restrictions on commercial speech, California courts apply the *Central Hudson* test. *See, e.g., U.D. Registry, Inc. v. State of California*, 144 Cal. App. 4th 405, 424-25 (2006); *Baba v. Board of Supervisors*, 124 Cal. App. 4th 504, 518-21 (2004). Similarly, as Plaintiff concedes (CRA Br. at 33), California courts rely on U.S. Supreme Court precedent for compelled subsidy of speech cases. *See Gerawan Farming, Inc. v. Kawamura* ("*Gerawan II*"),

33 Cal. 4th 1 (2004). California courts likewise apply the reasonable relationship test to factual commercial disclosure requirements. *See, e.g.*, *People v. Anderson*, 235 Cal. App. 3d 586 (1991); *Perlman v. People*, 99 Cal. App. 3d 568 (1979).

Plaintiff cites *Gerawan I* for the proposition that "article I's right to freedom of speech, without more, would *not* allow compelling one who engages in commercial speech to say through advertising what he otherwise would not say, when his message is about a lawful product or service and is not otherwise false or misleading." CRA Br. at 33 (citing 24 Cal. 4th at 509). *Gerawan I*, like *United Foods*, considered the constitutionality of a government regulation that compelled the "funding of generic advertising." *Gerawan I*, 24 Cal. 4th at 509. Just as *United Foods* does not state the applicable First Amendment test for the compelled disclosures of noncontroversial, factual commercial information, so also *Gerawan I* does not state the applicable test under the California Constitution for compelled disclosures of noncontroversial, factual commercial information. Any other conclusion would undermine the well-developed legislative framework that presently protects consumers in California by requiring the disclosure of uncontroversial, factual commercial information. *See, e.g.*, Cal. & Health & Saf. Code §§ 110423, 111170, 25250.25; Cal. Fin. Code § 22317.2; Cal. Pub. Res. Code § 15013(b).

Plaintiff's interpretation of *Gerawan I*, for example, would render constitutionally suspect such foundational regulatory schemes as Proposition 65. Proposition 65 provides: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." Cal. Health & Saf. Code § 25249.6 (2007). It compels the disclosure of this noncontroversial, factual commercial information in order to ensure the citizens of California are "informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm" in order to "protect themselves." Cal. Health & Saf. Code Div. 20, Ch. 6.6 Note §1 (2007). The California Supreme Court has repeatedly affirmed and enforced Proposition 65. *See, e.g.*, *People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294 (1996).

As Plaintiff recognizes, few California cases address commercial disclosure requirements (CRA Br. at 29), because few commercial actors challenge the state's authority to compel the disclosure of purely factual commercial information in the context of the purchase and sale of goods and services. In a case on point, the Superior Court for the City of San Francisco addressed a school bus company's challenge to Proposition 65's requirement that businesses display a "safe harbor warning" advising the public of the presence of toxic substances in the location. *Environmental Law Foundation v. Laidlaw Transit Services*, 2008 WL 2157672 (Cal. Super. Jan. 8, 2008). Directly relying on the Second Circuit's reasoning in *Sorrell*, the court rejected CRA's argument that a stricter form of scrutiny is required:

> [T]he warning here falls under case law for labels and warnings, and easily meets the corresponding rational basis standard of scrutiny. "Regulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech and will be sustained if they are 'reasonably related to the State's interest in preventing deception of consumers.'"

Id. at *2 (quoting *Sorrell*, 272 F.3d at 113). The Superior Court recognized that Proposition 65 mandated the "disclosure of 'accurate, factual, commercial information' . . . for the benefit of the consumers." *Id*. at *2. As such, the purpose of the requirement was to ensure that businesses warn people before exposing them to toxins to promote the health and safety of the public, not to prevent consumer deception. *Id.* at *3. The Superior Court found that the compelled disclosure of uncontroversial factual commercial information was reasonably related to the state's purpose, and was thus constitutional under the California Constitution. *See id.*

The California Court of Appeals has also applied the reasonable relationship test of *Zauderer* to uphold the mandated disclosure of noncontroversial commercial facts. In *People v. Anderson*, defendant objected to being compelled to disclose the name and address of the manufacturer of any video or audiotape he offered for sale, as required by "anti-piracy" legislation under the Penal Code. 235 Cal. App. 3d at 588. The court found that the speech at issue was commercial speech and the state's interest was a desire to protect the public and the entertainment industry from financial "losses suffered as a result of the 'piracy and bootlegging' of the industry's products." *Id.* at 590-91. The court relied on *Zauderer* and found that

California must only show a reasonable relationship between the statute and the state's interest. *Id*. at 591. Applying *Zauderer*, the court held the compelled disclosure constitutional, reasoning that a commercial actor's "'constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.'" *Id*. (quoting *Zauderer*, 471 U.S. at 651) (emphasis in original).

In sum, challenges to the compelled disclosure of noncontroversial factual commercial information are constitutional under California's Constitution so long as they pass the same reasonable relationship test that *Zauderer* uses to analyze the question of federal constitutionality.

CONCLUSION

For the foregoing reasons, we urge the Court to deny Plaintiff's Motion for Declaratory Relief and Preliminary Injunction, and uphold Ordinance 40-08.

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Respectfully submitted,

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